

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1121

To be argued by
BARRY BASSIS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

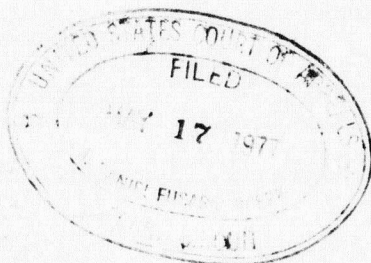
GLEN THOMAS BEVERLY and
FAON DE JESUS RODRIGUEZ,

Defendants-Appellants.

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Docket No. 77-1121

BRIEF FOR APPELLANT
GLEN THOMAS BEVERLY

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether appellant Beverly was entitled to a charge on the lesser-included offense of simple possession, in violation of 21 U.S.C. §844, as well as an instruction on entrapment.
2. Whether the instructions on accomplice and informer testimony and on the interest of appellant Beverly were heavily weighted against the defense.
3. Whether appellant Beverly's conviction under Count Four merges with his conviction under Count Two.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable George C. Pratt) rendered on March 2, 1977, after a jury trial, convicting appellant Glen Thomas Beverly of conspiracy to distribute cocaine (21 U.S.C. §846) (Count I), possession of cocaine with the intent to distribute (21 U.S.C. §841(a)(1); 18 U.S.C. §2) (Count IV), and unlawful distribution of cocaine (21 U.S.C. §841(a)(1); 18 U.S.C. §2) (Count V). Appellant Beverly was sentenced under the Youth Corrections Act for treatment and supervision until released by the United States Parole Commission pursuant to 18 U.S.C. §5017.

The Legal Aid Society, Federal Defender Services Unit, was continued as counsel to Mr. Beverly on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Glen Thomas Beverly and his brother-in-law, Faon De Jesus Rodriguez, were indicted* for unlawful distribution of four ounces of cocaine on November 4, 1975, and March 3, 1976; for possession of the drugs with intent to distribute on those dates; and for conspiracy to distribute cocaine between November 1975 and March 1976. Appellant Beverly was

*The indictment is "B" to appellants' separate appendix.

subsequently convicted of the conspiracy count in addition to the possession and distribution counts relating to the March 3 transaction.* Beverly was acquitted of the two counts relating to the November 4 transaction.

A. The Government's Case

The prosecution's case rested largely upon the testimony of Robert Gonsieski, an unindicted co-conspirator. On November 4, 1975, Gonsieski had sold four ounces of cocaine to Michael Kane, an agent of the Drug Enforcement Administration ("DEA") (1.55**). During the next four months, the agent tried unsuccessfully to obtain larger quantities of cocaine from Gonsieski (1.62). On February 24, 1976, the officer arrested Gonsieski for the sale. Realizing that he faced a possible sentence of 45 years, Gonsieski immediately agreed to cooperate, and named appellant Beverly and co-defendant Rodriguez as his source of cocaine in the November transaction, and agreed to set up a deal which the Government agents could observe (1.74, 46, 64).

Gonsieski, then 23 years old, had mainlined heroin and cocaine and used a variety of other drugs and had been a drug

*Co-defendant Rodriguez was convicted of the conspiracy count and acquitted of all the substantive counts.

**Page references to the trial minutes of December 20, 1976, are preceded by "1"; minutes of December 21 are preceded by "2"; and minutes of December 22 are preceded by "3".

dealer since he was 16. He had been suspended from high school for peddling narcotics to other students, and continued this activity at New York Community College where he, Rodriguez, and appellant Beverly had been enrolled (1.45, 88, 89, 90, 96). Though he admitted selling cocaine between 30 and 50 times, Gonsieski had never spent a day in jail. He had pleaded guilty to using a telephone facility for the purpose of transacting narcotics business and faced a possible four years' imprisonment (1.127, 77, 98). Gonsieski had continued to use drugs following his arrest (1.90, 92).

The Government agents were unable to verify any of Gonsieski's information regarding the defendants other than personal data such as their address (2.19). On March 2, 1976, Gonsieski met with co-defendant Rodriguez, allegedly to set up the drug transaction. Government agents observed the two but could not hear the conversation (1.66; 2.18, 19). On the following day, Gonsieski informed the agents that the transaction was set for that afternoon. He was searched by the officers before proceeding to the designated location. Appellant Beverly (whom the agents had never seen before) was observed leaving his home with a brown paper bag,* waving to co-defendant Rodriguez, and driving around the block several times. Appellant Beverly parked his van behind Gonsieski's

*Officer Kane had stated in the complaint that co-defendant Rodriguez had carried the bag, but claimed at trial that he had been mistaken (1.159).

car and carried the bag to the informer's vehicle. Gonsieski signalled the agents, who arrested appellant* and seized the bag, which contained four ounces of cocaine (2.23, 98). A search of appellant Beverly's person uncovered a container and film case with traces of cocaine and a paper with a code (2.107, 108). In the van, the agents found cards with prices and weights that seemed appropriate to cocaine transactions, and the notation "COD", which the agent (who was experienced in such matters) interpreted as "cash or delivery" (2.146, 147, 148).

After his arrest, appellant Beverly agreed to cooperate and informed a federal agent that the papers found in his possession were codes of prior transactions (2.116). The statement was never reduced to writing, and the agent's report did not mention either the agreement to cooperate or the drug codes (2.134, 136, 139).

B. The Defense

Appellant Beverly, testifying in his own defense, gave a different version of the events than had Gonsieski. The two agreed, however, that they had known each other for about six years and had been friendly at one time. Beverly testified that they had recently argued when Gonsieski appeared, uninvited

*Co-defendant Rodriguez was arrested at approximately the same time. He was walking westward from his (and Beverly's) home at 751 Glenmore Avenue, which was several blocks from the scene of Beverly's arrest (2.158).

and intoxicated, at appellant's wedding (2.160, 163). Appellant Beverly had known of Gonsieski's trafficking in drugs and had frequently urged him to cease these activities. Beverly had never supplied Gonsieski with narcotics or served as his contact in such dealings (2.163, 164, 165, 166).

On the morning of March 3, Gonsieski called Beverly to ask for help in repairing his car. When appellant Beverly and co-defendant Rodriguez arrived at Gonsieski's house, the latter told them that he had sent the car to a repair shop (2.167, 168, 169). Appellant Beverly asked Gonsieski to help him get a job at the cab company where he worked. Gonsieski agreed to do so, but asked Beverly to do him a favor and hold onto a quantity of cocaine and papers that he had had to remove from his car. Gonsieski was afraid that his aunt would find them in the house and report him to the police (2.169, 170, 171). Beverly hesitantly agreed, and when he followed Gonsieski's directions for the return of the drugs,* he was arrested (2.171, 173, 174, 176, 177). Appellant Beverly first told the Government agents that he had obtained the drugs from Gonsieski, but when they refused to believe him and threatened him with 30 years' imprisonment, he lied and said that co-defendant Rodriguez had supplied the cocaine (2.179).

*When appellant Beverly returned the bag of cocaine to Gonsieski, he forgot to return the informer's papers, which appellant had left in the glove compartment of his van (2.176).

The defense presented a character witness, Robert Jones (appellant Beverly's employer and the owner of a power transmission and conveyer factory). Mr. Jones described Beverly as hard-working, reliable, and honest -- an opinion shared by other employees (3.4-5).

C. The Charge

Counsel for appellant Beverly requested the following instruction:

The defendant Beverly contends that the Government informant, Robert Goncieski, had earlier given him the cocaine which was found on the car seat on March 3, 1976. He asserts that Goncieski had asked him earlier on that day to hold the drugs for him for several hours. Thus Beverly argues (a) that he had no intent to distribute this cocaine; and (b) that he was induced or entrapped into possessing the cocaine by the activity of the informant Goncieski on the morning of March 3rd.

If, after an impartial consideration of the evidence, you find beyond a reasonable doubt that defendant Beverly possessed cocaine on March 3, 1976 with intent to distribute it, you may find him guilty of Count Four.

On the other hand, if you find that he did possess the cocaine, but without any intent to distribute it, you may find defendant Beverly guilty on Count 4 of simple possession.

Title 21, United States Code, §844
Rule 31(c), Federal Rules of Criminal
Proced.

In that event, however, before finding defendant Beverly guilty of simple possession of cocaine on March 3, 1976, you must first

find, beyond a reasonable doubt, that he was not entrapped into that possession by the Government informant, Robert Guncieski.

(Court Exhibit A, Request No. 3).*

The Government objected to the requested charge (2.216, 217), and the court refused counsel's request for the following reasons:

With respect to the charge on the lesser included offense as against the Defendant Beverly and entrapment, both in relation to the March 3rd, '76 charge, which is Count Four, I believe, I have decided I will not give that charge. And the reason of my thinking on that, so that the record will be clear, is that the only evidence that points in that direction is the testimony of the Defendant Beverly.

If the jury believes that testimony, then they should find him not guilty on Count Four as well as on Count Five. And providing the lesser included offense, together with a defense of entrapment, which tags onto the lesser included offense, not only will unnecessarily encumber the problems which I will be presenting to the jury, but it's simply not warranted by the evidence.

If they believe Beverly's testimony, he is entitled to be acquitted as far as March 3rd is concerned.

(3.8).

Judge Pratt noted further that "there is no basis on which the jury could find him [appellant Beverly] guilty only of possession without also finding entrapment being present" (3.10). Beverly's attorney took exception to the court's ruling, "par-

*The remainder of Request No. 3 was a standard entrapment instruction.

ticularly with respect to the decision not to charge the lesser included" (3.13; see also 3.137 (exception following the charge)). The court thus charged neither the lesser included offense nor the defense of entrapment.

The court's instruction on accomplices and informers contained the following language:

If accomplices and informers could never be used on a trial, of course, there would be many crimes involving real and serious guilt in which convictions could not be obtainable. Their testimony, however, must be received with great caution and given such weight as you deem it entitled to be received under all the circumstances of the entire case.

The law does not prohibit the use of an accomplice or an informer. But whether you approve of their use is not to enter into your consideration in this case. In certain types of crime the Government of necessity is frequently compelled to rely upon the testimony of accomplices, of persons with criminal records, or of informers. Otherwise, it would be difficult to detect or prosecute some wrongdoers, and this particularly is true in conspiracy cases. Often the Government has no choice in the matter. It must take the witnesses to the transaction as they find them.

The testimony of an accomplice or informer alone, if believed by the jury, may be of sufficient weight to sustain a verdict of guilty, even though not corroborated or supported by other evidence.

However, I reemphasize that the jury should keep in mind that such testimony is always to be received with caution and weighed with great care.

You should never convict a defendant upon the unsupported testimony of an accomplice or informer unless you believe that

unsupported testimony beyond a reasonable doubt.

(3.125-126).*

With respect to appellant Beverly's testimony, the court stated:

With respect to the Defendant Beverly, while the law does not require a defendant to testify, it permits him to do so on his own behalf. Obviously, a defendant has a deep personal interest as a result of his prosecution. Indeed, it is fair to say he has the greatest interest in the outcome.

Interest creates a motive for false testimony. And a defendant's interest in the result of his trial is of a character possessed by no other witness.

In appraising the credibility of the Defendant Beverly you may take that fact into consideration. However, I want to say with equal force to you, it by no means follows that simply because a person has a vital interest in the end result, that he is not capable of telling a truthful and straightforward story.

It is for you to decide what extent, if at all, the defendant's interest has affected or colored his testimony in this case.

(3.127-128).

Appellant Beverly's counsel objected to these portions of the court's instructions:

... I didn't think that your Honor's instructions on that was as strong as the instruction which I submitted [**] and I think especially when it was put in juxtaposition

*The complete text of Judge Pratt's charge to the jury is "C" to the joint appendix to appellants' briefs.

**Counsel's requests (Nos. 1 and 2) are "D" to the joint appendix to appellants' briefs.

with the charge on the Defendant Beverly's interest. I think the failure to develop in more particular detail what the problems are with an informant or accomplices [sic] testimony, when compared with how fully the defendant's interest was explained, tends to denigrate the importance of the cautionary instruction on accomplices and informants.

(3.137).

The court refused to modify the charge (3.140).

D. Verdict and Sentence

The jury found appellant Beverly guilty of possession with intent to distribute cocaine and the distribution of cocaine on March 3, 1976, and of conspiracy to distribute cocaine. He was acquitted of the possession with intent to distribute and distribution counts relating to the November 4 transaction. Co-defendant Rodriguez was convicted of the conspiracy count and acquitted of the four substantive counts (3.157).

On March 2, 1977, Judge Pratt sentenced appellant Beverly under the Youth Corrections Act, pursuant to 18 U.S.C. §5010(b).*

*The court additionally imposed a special parole term of three years. Following a Rule 35 motion, Judge Pratt vacated the parole term.

ARGUMENT

Point I

APPELLANT BEVERLY WAS ENTITLED TO A CHARGE ON THE LESSER-INCLUDED OFFENSE OF SIMPLE POSSESSION, IN VIOLATION OF 21 U.S.C. §844, AS WELL AS AN INSTRUCTION ON ENTRAPMENT.

Appellant Beverly testified that at the time of his arrest he was not transferring cocaine to Gonsieski, but was merely returning the drugs which the informer had asked him to hold. Appellant asserted that he had never engaged in drug trafficking and that he only possessed cocaine on March 3 because the informer had induced him to do so. Based upon this evidence, appellant was entitled to a charge on the lesser-included offense of simple possession, in violation of 21 U.S.C. §844, and to an instruction on entrapment. The court's refusal to give both of these instructions despite the written request of appellant Beverly's counsel and the attorney's exception to the charge requires the ordering of a new trial.

A.

Rule 31(c) of the Federal Rules of Criminal Procedure provides that "the defendant may be found guilty of an offense necessarily included in the offense charged." This rule, which codified pre-existing law, entitles a defendant to a charge on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit

him of the greater. Keeble v. United States, 412 U.S. 205, 208 (1973). Such a charge is "proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." Sansone v. United States, 380 U.S. 343, 350 (1965). The evidence as to the lesser count "need not be uncontradicted or in any way conclusive upon the question; so long as there is some evidence upon the subject, the proper weight to be given it is for the jury to determine." Stevenson v. United States, 162 U.S. 313, 314 (1896).

It is undisputed that the crime of simple possession in violation of 21 U.S.C. §844 is a lesser-included offense of both possession with intent to distribute and unlawful distribution of cocaine (21 U.S.C. §841(a)(1)). United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977). According to appellant Beverly's version of the facts, he was not supplying Gonsieski with cocaine, but was merely safekeeping the drugs which already belonged to the informer. If credited, appellant Beverly's testimony established only the misdemeanor of simple possession. See United States v. Swiderski, supra, at 449-452.

The reason for the court's refusal to charge the lesser offense was "the only evidence that points in that direction is the testimony of the defendant Beverly" (3.8). However, it is the very fact that appellant Beverly's testimony created a factual dispute which necessitated an instruction on the lesser

crime so that the jury could resolve the issue. See United States v. Brischetto, 538 F.2d 208, 210 (8th Cir. 1976).

The court also reasoned, again erroneously, that if the jurors "believe [Beverly's] testimony, then they should find him not guilty on Count Four [possession with intent to distribute] as well as on Count Five [unlawful distribution]" (3.8). The Supreme Court has explicitly found this inadequate justification for a refusal to charge a lesser offense:

[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States,
supra, 412 U.S. at 212-213.
(Emphasis in the original).

As counsel vainly sought to remind the court (3.9), there was a grave danger of the jury's resolving its doubts in favor of conviction since appellant Beverly had taken the stand and admitted the knowing possession of cocaine on March 3. Under these circumstances, appellant was entitled to a charge on the lesser-included offense.

B.

According to appellant Beverly's version of the events, he came into possession of the cocaine at the inducement of Gonsieski (the Government informant) and had never previously engaged in such behavior. Viewing the evidence in the light most favorable to the defendant, as is proper in determining whether a jury question is raised (United States v. Anglada, 524 F.2d 296, 298 (2d Cir. 1975)), it is clear that the court erred in refusing to submit the issue of entrapment to the jury.

Under the law of this Circuit, appellant Beverly was entitled to an instruction on entrapment. Beverly's claim that Gonsieski had lured him to his house on the pretext of repairing his car and then asked appellant to keep the informer's drugs and papers for several hours constituted "some evidence of government inducement." United States v. Anglada, *supra*. Moreover, appellant's testimony that he had never previously possessed cocaine or taken part in the drug trade directly contradicted the informer's claim that Beverly had supplied him with drugs in the past. Thus, the defense met the requirement of producing "any evidence negating propensity, whether in cross-examination or otherwise, [which] requires submission [of the entrapment defense] to the jury, however unreasonable the judge would consider a verdict in favor of the defendant to be." United States v. Riley, 363 F.2d 955, 959 (2d Cir. 1966).

The court, in the instant case, refused to charge on

entrapment because it believed that if appellant were guilty only of simple possession of cocaine, then the entrapment defense would be established as a matter of law (3.13). However, by refusing, over defense counsel's objection, to charge that the jury could convict of the lesser offense of simple possession, the court foreclosed its consideration of the entrapment defense as a question of law. If Judge Pratt thought that entrapment would be established as a matter of law* in the event that the jurors believed appellant Beverly and convicted him solely of simple possession, he was nevertheless required to charge the jury on the lesser included offense. Then, in the event of a conviction on this count alone, the court would have had to direct a verdict of acquittal on the ground of entrapment.

C.

The court's refusal to charge on the lesser-included offense and the entrapment defense mandates a reversal of appellant Beverly's conviction on the conspiracy count as well as the substantive counts. Appellant was acquitted of the counts relating to the November transaction, in which Gonsieski had sold cocaine to a Government agent. The only other evidence

*This finding would seem incorrect in view of the dispute between Gonsieski and appellant Beverly as to the latter's propensity. Moreover, the jury could have believed appellant Beverly's claim that he was merely holding the drugs for Gonsieski (and thus committed simple possession) but rejected his claim that he required any coaxing to do so. There was no requirement that the jury accept or reject appellant's account in its entirety.

linking appellant Beverly to a conspiracy involving the intent to distribute drugs was his delivery of the narcotics to Gonsieski on March 3. If, as appellant testified, he was merely holding the drugs for Gonsieski (and was guilty of simple possession) or if he had been entrapped by the informer, the jury would have had to acquit him of the conspiracy count because of the absence of the requisite intent.* Thus, the errors in the charge prejudiced appellant Beverly with respect to the conspiracy charge and require a reversal of his conviction of this crime as well as the other charges.

* * * * *

Appellant Beverly's testimony provided a sufficient basis for the submission of the lesser offense and the entrapment defense. The denial of the requested charges mandates a reversal of the conviction and the ordering of a new trial.

*As the Supreme Court has held, a conspiracy to commit a particular substantive offense cannot exist without at least the criminal intent necessary for the substantive offense itself. Ingram v. United States, 360 U.S. 672, 678 (1959).

Point II

THE INSTRUCTIONS ON ACCOMPLICE AND
INFORMER TESTIMONY AND ON THE INTEREST
OF APPELLANT BEVERLY WERE HEAVILY
WEIGHTED AGAINST THE DEFENSE.

The Government's case rested upon the testimony of Robert Gonsieski, who, in addition to his chronic drug use, admitted selling cocaine between 30 and 50 times. Gonsieski had never spent a day in jail and had been permitted to plead guilty to an offense with a maximum sentence of four years. He was awaiting sentence before Judge Pratt and admitted feeling that his chances were better if the defendants were convicted upon his testimony (1.135). Appellant's claim was that the informer set him up on March 3 so that the Government agents would think that appellant was the supplier and that Gonsieski had cooperated with them. Under these circumstances, the court's instructions on the credibility of the informer and appellant Beverly were most crucial.

While Judge Pratt instructed the jurors that the testimony of accomplices and informers must be received with great caution, the remainder of the charge stressed the necessity of such evidence to the Government. The court described an informer as "one who provides evidence against a defendant in return for some personal benefit given him by the government" and made one fleeting reference to Gonsieski's plea to a lesser charge and the fact that "his cooperation would be known to the Judge at the time of his sentencing" (3.125).

The court was far more extravagant in its language depicting appellant Beverly's motive to testify falsely:

Obviously, a defendant has a deep personal interest as a result of his prosecution. Indeed, it is fair to say that he has the greatest interest in the outcome.

Interest creates a motive for false testimony. And a defendant's interest in the result of his trial is of a character possessed by no other witness.

(3.127; emphasis added).

Again, the jury was reminded of appellant's "vital interest in the result" (3.128).

While the charge met the technical requirement of United States v. Swiderski, 539 F.2d 854, 860 (2d Cir. 1976), that the court call the jurors' attention to their duty to scrutinize the testimony of accomplices and informers, the balance of the instruction was heavily weighted against the defense. As appellant Beverly cogently noted in his objection to the charge, "the failure to develop in more particular detail what the problems are with an informant or accomplice's testimony, when compared with how fully the defendant's interest was explained, tends to denigrate the importance of the cautionary instruction on accomplices" (3.137). Unlike the court's instruction, counsel's written request to charge (which Judge Pratt had refused to deliver) called the jurors' attention to the many crimes Gonsieski admitted committing but for which he had never been indicted (see Request No. 2). Certainly, Gonsieski had as vital an interest in the proceedings as appel-

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lant. By placing undue emphasis on the Government's need for the informer's testimony and then conveying the impression that appellant Beverly had a greater motive to lie than the informer, the court effectively undermined the standard "close scrutiny" charge.

In view of counsel's prior request and objection to this charge, the unfair instruction on the critical issue of credibility of witnesses constituted reversible error. Therefore, a new trial is required.

Point III

APPELLANT BEVERLY'S CONVICTION UNDER COUNT FOUR MERGES WITH HIS CONVICTION UNDER COUNT FIVE.

Counts Four and Five of the indictment were based on a single transaction involving the alleged sale of four ounces of cocaine on March 3, 1976. Count Four charged that appellant Beverly possessed the cocaine with intent to distribute it, in violation of 21 U.S.C. §841(a)(1). Count Five charged that he actually distributed the same cocaine on the same day, in violation of the same statutory provision.

It is established law that where the gravamen of two offenses is identical, the convictions of the defendant for those offenses merge. See, e.g., Prince v. United States, 352 U.S. 322, 329 (1957). As to the crimes charged in Counts Four and Five of the instant proceeding,

[t]he gravamen of each offense is the distribution of a controlled substance: when the intent is carried out by a successful sale the offenses merge.

United States v. Curry, 512
F.2d 1299, 1306 (4th Cir.
1975).

See also United States v. Stevens, 521 F.2d 334, 336-337 (6th Cir. 1975); United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975); but see United States v. Horsley, 519 F.2d 1264 (5th Cir. 1975), cert. denied, 424 U.S. 944 (1976), stating that the court follows the "different evidence" rule.* Thus, following

*An internal conflict on the issue exists in this Circuit. Compare United States v. Caicedo, Doc. No. 76-1357 (November 23, 1976), with United States v. Espanza, Doc. No. 76-1212 (September 23, 1976).

the rule of the Fourth and Sixth Circuits, appellant Beverly's conviction on Count Four merged with his conviction on Count Five. Consequently, the judgment of conviction and sentence on Count Four must be vacated and the case remanded for resentencing.

Although the sentence imposed on Count Four was concurrent with the sentence imposed on Count Five, the sentence on the merged count must be set aside because of its potential impact on the defendant's parole eligibility. United States v. Machibroda, 338 F.2d 947, 949 (6th Cir. 1964). The concurrent sentence on the remaining count should be set aside and the case remanded for resentencing because of the possibility, in cases of merger, that conviction on the merged count improperly affected the sentence imposed on the remaining counts. See, e.g., United States v. Spears, 449 F.2d 946, 955 (D.C. Cir. 1971).

Point IV

INSOFAR AS THEY ARE NOT INCONSISTENT WITH ARGUMENTS RAISED ON APPELLANT BEVERLY'S BEHALF, HE ADOPTS THE ARGUMENTS RAISED IN THE BRIEF OF CO-APPELLANT RODRIGUEZ.

CONCLUSION

For the above-stated reasons, the judgment should be reversed and a new trial ordered; alternatively, Count Four should be vacated and a re-sentencing ordered as to the remaining counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

May 17, 1977

I hereby certify that a copy of this brief [REDACTED]
[REDACTED] has been mailed to the United States Attorney
for the Eastern District of New York.

Barry Bassis